In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–11a) is reported at 339 F. 2d 324. The Board's decision and order (Pet. 12a–24a) are reported at 143 NLRB 233.

JURISDICTION

The decision of the court of appeals was entered on November 24, 1964 (Pet. 1a). Petitions for rehearing and for rehearing *en banc* were denied on January 15, 1965, and a decree was entered on January 18, 1965. On April 7, 1965, Mr. Justice Harlan en-

tered an order extending the time for filing a petition for a writ of certiorari to and including June 14, 1965 (Pet. 2). The petition for certiorari was filed on June 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances present in this case, the union committed an unfair labor practice by causing a member to be barred from employment pursuant to a union rule, not incorporated in the collective bargaining agreement, providing that a member who procures a "withdrawal card" from the union shall be deemed to have withdrawn from employment in the area of the union's jurisdiction.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 27a–30a of the petition.

STATEMENT

On September 1, 1963, one day after its collective bargaining contract expired, Local 50 called an economic strike at Ward Baking Company's Bronx plant. Employee Charles Fisher, a member of Local 50, joined the strike (Pet. 15a; J.A. 15–16, 33, 63).[1] He picketed for about three weeks until September 22, when he obtained employment at the Company's Newark, New Jersey plant (Pet. 15a; J.A. 14–15,

[1] "J.A." references are to the portions of the record printed as a joint appendix for the court below and filed with the petition.

51–52, 64), a separate bargaining unit represented by American Bakery Workers' Local 84 (Pet. 15a; J.A. 790). Fisher was told by Ward's Newark personnel manager that his job there was temporary and that he could return to the Bronx plant when the strike ended (Pet. 2a, 17a). Nevertheless, he was apparently requested to pay dues to Local 84 (Pet. 18a–19a, n. 3). To avoid paying an initiation fee to the Newark local, Fisher requested and obtained a "withdrawal card" from Local 50 on October 29 (Pet. 15a; J.A. 84–85, 127–128).[2]

The strike ended November 7, when agreement on a renewal of the old contract was reached (Pet. 15a; J.A. 16). The next day, Local 50 and Company officials met to determine the order of recall of the strikers. Due to the discontinuance and curtailment of some of the Company's operations, only 60 employees out of the pre-strike complement of approximately 450 could be recalled immediately (Pet. 15a–16a; J.A. 16–17, 44). Although the parties agreed to

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[2] The bylaws of Local 50 and the constitution of its International Union provide that (Pet. 16a–17a; J.A. 173, 175–176):

> A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union. The holder of a withdrawal card shall be exempt from the payment of union dues and shall not be permitted to participate in local union meetings.

The bylaws and the constitution further provide that, upon depositing his withdrawal card "with any local union, a member shall be re-admitted to active membership without the payment of a new initiation fee" (J.A. 174, 177).

recall in order of seniority,[3] and to use a consolidated plantwide seniority list, Fisher, who was 35th on the list, was not recalled (Pet. 16a; J.A. 17). When Fisher's name was reached, Union Secretary-Treasurer Genuth told Plant Manager McGuire that Fisher "had taken a transfer card and * * * was not entitled to recall" (Pet. 16a, 18a; J.A. 18–19). For that reason, Fisher's name was scratched from the seniority list (*ibid.*).

The following week, Fisher was laid off from the Newark plant (Pet. 16a; J.A. 81–82). He went to the Bronx plant to ask for reinstatement, but was told that, although the Company was willing to put him back to work, Local 50 had objected (Pet. 16a;

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[3] The seniority provisions of the contract read (Pet. 19a):

(c) Seniority rights shall terminate if an employee:

(I) voluntarily quits.

(II) is discharged for just cause.

(III) fails to return to work within (7) days notice by registered or certified mail to his last known address (unless unable to because of illness of which the company receives written notice). A copy of the company's notice shall be simultaneously served by mail upon the Local Union.

(IV) is laid off for the following period of time:

employee with less than 3 years continuous service—60 days.

employees with more than 3 years continuous service and less than 4 years—90 days.

employees with more than 4 years continuous service and less than 5 years—120 days.

employees with more than 5 years continuous service—180 days.

(V) In the event of the permanent shut-down of a department of any plant the employee who is laid off shall retain seniority for a period of one year for purpose of recall only.

J.A. 66). According to Company Personnel Manager McGuire, if the Union had not objected, Fisher "would have been advised to report either November 11th or the 18th when the bulk of the other employees were notified to report for work" (J.A. 19, 51). A few days later, Union officials Vangone and Killoran again told McGuire that Fisher was not to be returned to work because he had obtained a withdrawal card from Local 50 (Pet. 16a, 18a; J.A. 20–21). When Fisher subsequently went to the offices of Local 50 to ask its officials to remove their objections to his recall, he was told that he was no longer a member of the Local (J.A. 68).[4]

The Board found that the union rule that an employee who obtained a withdrawal card signified that he had withdrawn from employment in the area was not incorporated in the collective bargaining agreement between Local 50 and the Company.[5] The Board further found that Local 50 had caused the Company to refuse to reinstate Fisher, not because he had voluntarily quit, but in order to enforce its rule on withdrawal cards, and that such discrimination would tend to encourage employees to remain active members of Local 50 during strikes. Accordingly, the Board concluded that Local 50 had violated Section 8(b)(2) and (1)(A) of the Act (Pet. 12a, n.2, 19a–21a). The Board ordered Local 50 to

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[4] Fisher, however, was current in his dues payments to Local 50 (J.A. 68, 82–83, 85).

[5] Indeed, Secretary-Treasurer Genuth, who first advised the Company that Fisher should not be recalled, admitted that the bylaw provision had not been incorporated in the contract (Pet. 20a).

cease and desist from the unfair labor practice found, to make Fisher whole for any loss of pay resulting from the discrimination against him, and to notify the Company that it had withdrawn its objection to Fisher's reinstatement (Pet. 13a, 23a–24a).

The court of appeals (Judge Friendly dissenting) enforced the Board's order in full (Pet. 1a–11a).

ARGUMENT

The holding of the court below turns on the facts of this particular case and is in accord with settled authority. There is thus no occasion for further review.

1. The petition rests on the premise that the collective bargaining agreement between the Company and Local 50 incorporated, at least implicitly, the provision of the union rule that an employee who obtained a union withdrawal card shall be deemed to have terminated his employment (Pet. 2, 9, 10). This premise is contrary to the findings of the Board, which were sustained by the court of appeals. The Board found (Pet. 20a), and the court below agreed (Pet. 4a), that the withdrawal card provision had not become a part of the contract between the Company and Local 50, either by direct incorporation or by custom and practice.[6] Accordingly, the only question presented here is whether a union may enforce a union rule with respect to withdrawal from active membership, which is not incorporated in its

[6] The Board further found (Pet. 18a), and the court sustained the finding (Pet. 4a), that Fisher, in obtaining the withdrawal card, did not state that he was quitting employment at the Company's Bronx plant.

contract with the employer, by affecting an employee's job opportunities.

2. Contrary to petitioner (Pet. 8–11), the conclusion that such action is barred by the Act is fully consistent with *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17. One of the situations there involved union member Fowler who obtained a job with Bull Steamship Company without clearing through the union hiring hall. Bull had a collective agreement with the union which, although it contained a union security provision, did not include a hiring hall provision; the hiring hall requirement was simply a union rule. When notified of Fowler's action, the union refused to clear him and caused Bull to discharge him. The Board and the court of appeals found that the union had violated Section 8(b) (2) an (1)(A) of the Act, for the denial of employment to Fowler restrained and coerced him in his statutory right to refrain from observance of the union's rules and tended to encourage him and his fellow members to comply with union rules in the future. 347 U.S. at 28–33. This Court sustained that finding on the ground that "Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.*, at 41. It ruled that employees were entitled to protection in their rights to "be good, bad, or indifferent [union] members * * * without imperiling their livelihood" and that "encouragement to remain in good standing in a union" such as was involved in that case "is proscribed." *Id.*, at 40, 42.

Here, as in *Radio Officers*, the union caused the employer to deprive an employee of his job, not be-

cause of failure to pay periodic dues or initiation fees,[7] but in order to enforce a union rule. Also, as in *Radio Officers,* enforcement of the rule by affecting the employee's job opportunities tended to encourage "union membership." For, as the Board and the court below properly found (Pet. 21a, 7a), the Company's refusal to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain active members of Local 50 during a strike and to discourage transfers to sister locals.[8]

Radio Officers may not be distinguished on the ground that there the employee was being punished for failing to obey a union rule whereas here the employee voluntarily invoked the withdrawal card rule (Pet. 9, 11). The question is whether enforcement of the rule by affecting the employee's employment

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[7] Fisher was required to be current in his dues payments to Local 50 in order to secure a withdrawal card (J.A. 173–174, 85). He secured the withdrawal card on October 29, 1962, and he was passed over for reemployment on November 8 (Pet. 15a–16a). As the court below noted (Pet. 7a), "there is no question but that Fisher's dues were current."

[8] Judge Friendly, in dissent (Pet. 9a–11a), reasoned that, since Local 50 could have demanded Fisher's discharge under the union security clause had he become delinquent in dues, he was already encouraged to remain an active member of that Local; the withdrawal card rule merely afforded Fisher the "lesser" alternative of avoiding the payment of dues without at the same time being treated as delinquent. Whatever validity this view may have in other contexts, it lacks substance here. First, in passing over Fisher for reemployment, Local 50 never purported to rely on the union security clause of its contract. Second, in the circumstances of this case, the withdrawal card rule was not a lesser alternative because Fisher, despite obtaining such a card, continued to pay dues to Local 50 and was current in his dues obligation to that Local (see Pet. 7a, n. 3; n. 4, p. 5, *supra*).

status would tend to encourage union membership, and, as shown, this occurred here no less than in *Radio Officers*. The withdrawal card rule may be of benefit to members who are laid off or who wish to transfer permanently to another location, but during a strike it in no way benefits a member not desiring a permanent transfer. In such circumstances, even though the rule is "voluntarily" invoked, its enforcement by affecting the members' jobs can only inure to the benefit of the union, by encouraging members to remain active and to refrain from seeking a temporary transfer.

3. There is no substance to petitioner's contention (Pet. 12–16) that the Board did not adequately spell out its finding on the tendency of Local 50's action to encourage union membership. As shown, the situation here is virtually the same as that in *Radio Officers*, and the Board explicated the basis for its decision here to the same extent as it did there. The Court recognized in *Radio Officers* that specific proof of an intent to encourage union membership was not necessary where, as here, the union sought to enforce a union policy through discrimination in employment; for encouragement of union membership is "obviously a natural and foreseeable consequence" of discrimination so predicated. 347 U.S. at 52.

Nor is there substance to petitioner's contention (Pet. 8, 16–17) that the Board's decision here interferes with the collective bargaining process and with the union's ability to negotiate contract provisions with respect to the allocation of work. The Board simply found, and the court below agreed, that the

parties had not incorporated the union rule on the effect of securing a withdrawal card in the collective bargaining agreement. Nothing in the decision precludes the parties from negotiating appropriate work allocation provisions in the future,* or purports to restrict the contractual language which may be used for that purpose. See *Cafero* v. *National Labor Relations Board*, 336 F. 2d 115 (C.A. 2), affirming 144 NLRB 1555 (union rule on seniority incorporated into contract).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1965.

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* Indeed, the Board specifically reserved the question of the legality of the withdrawal card provision "if it were a part of the contract" (Pet. 12a, n. 2).

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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STATUTE:

Labor Management Relations Act of 1947 as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 161 et seq.):
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REPLY BRIEF FOR PETITIONER

The Brief in Opposition[1] attributes to the Board findings which it never made, analyzes the controlling precedent in this Court by omitting the critical facts

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[1] The Brief in Opposition will be referred to herein as "Opp." and the Petition for Certiorari as "Pet." References to the decisions of the Board and Court of Appeals will be to the Appendix to the Petition, e.g. "Pet. p. 1a."

on which decision turned and by misstating its holding and ignores completely one of the questions presented by the Petition. Such a virtuoso performance calls for a detailed reply.

I.

A. The first question presented is whether the Board's decision is consistent with *Radio Officers* v. *Labor Board,* 347 U.S. 17. It is the theory of the Petition that the Board's order and its affirmance by the Court of Appeals impermissibly expand *Radio Officers* with respect to two of the elements of an 8(a)(3) violation—1) that the discrimination must have a purpose to "encourage" and 2) that the encouragement be of union "membership". In order to sustain the Board's decision the Memorandum in Opposition finds it necessary to attribute to the Board two findings which it never made.

These "post-hoc rationalizations"[2] are contained in a single sentence:

> "The Board further found that Local 50 had caused the Company to refuse to reinstate Fisher, *not because he had voluntarily quit,* but in order to enforce its rule on withdrawal cards, and that such discrimination would tend to encourage employees to remain active members of Local 50 *during strikes.*" (Opp. p. 5, emphasis supplied).

The underscored findings were never made by the Board, are unsupported by the record, and are indeed squarely contradicted by findings which were actually made. There is nothing in the language of the withdrawal card rule, let alone in the Board's findings, to

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[2] Cf. *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168.

suggest that the term "active membership" in the rule relates to being active "during strikes." On the contrary, the Trial Examiner expressly rejected the allegation of the complaint that the union caused the denial of reinstatement because Fisher had not participated in the strike (JA 187, n. 4), a conclusion left undisturbed by the Board. The resurrection of that allegation at this stage of the proceedings can be explained only as an implicit acknowledgment of the validity of the assertion (Pet. pp. 14-16) that the Board's findings do not adequately explain why "active membership" in the union bylaws constitutes "membership" within § 8 (a) (3) as interpreted in *Radio Officers,* 347 U.S. at 40.

In asserting that the Board found that the union had acted "not because [Fisher] had voluntarily quit" the Opposition overlooks entirely the critical finding of the Trial Examiner, adopted by the Board, to which we pointed at p. 10 of the Petition:

> "The union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA pp. 184-185)

If the Board had made a finding, as its Supreme Court counsel now claims, that the union's action was not due to the fact that Fisher had voluntarily quit by taking out the withdrawal card, there would be room for arguing that its action can be explained only as punishment of Fisher. Under those circumstances the correctness of the findings as to motivation might have been merely an evidentiary issue virtually immunized from review here by *Labor Board* v. *Pittsburgh S.S. Co.,* 340 U.S. 498. But since the Board made no such

finding, and indeed found the contrary, its conclusion that the union had enforced the bylaw is to give the word "enforce" the meaning "relied upon". Whether this is permissible under *Radio Officers* is the central issue presented by the first question in the Petition for Certiorari.[3] That it is not permissible becomes clear when *Radio Officers* is examined with greater care than by the Opposition. For we submit that the Board's statement of *Radio Officers* (Opp. p. 7) omits the main facts on which decision turned.

The controlling facts regarding Fowler, the charging party, were as follows: The union had a rule which required that all members had to be cleared through the union for employment. Fowler bumped another member from a job with the Bull Steamship Company without being cleared by the union. *For this action*

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[3] The Board's version of the Questions Presented, besides ignoring the second question entirely (see pp. 9-10, *infra*) misstates "the circumstances of this case" (Opp. p. 2) in two particulars relevant under *Radio Officers*. The Board assumes that Fisher was "barred from employment", a phrase which carries the innuendo of blacklisting and is therefore suggestive of punishment. The Board, however, found only that the union caused Fisher to be denied seniority status; he was in other words, treated as a new employee. There is not the slightest suggestion that the union would have insisted that Fisher be denied employment if the company were hiring new employees. Nor is there any indication that the union sought to deprive Fisher of his job at Ward's Newark plant, where in fact he was working at the time that the seniority determinations regarding the Bronx employees were being made (Pet. p. 16a).

The Board's further assertion that the union was acting "pursuant to a union rule," while a softer euphemism for "enforcing" which is used elsewhere in the Opposition, is likewise inaccurate. See Pet. pp. 10-11 and pp. 5-6 herein.

Fowler was suspended from membership by the union. The union notified Bull that Fowler was no longer in good standing and that it would never clear Fowler for work with it. 347 U.S. at 30-31. Thus the facts of Fowler's case, omitted from the Board's description, make clear that Fowler was being disciplined by the union and that part of his punishment was denial of future employment by Bull. As this Court said, the union caused the employer to discriminate against Fowler "by denying him employment in order to coerce Fowler into following the union's desired hiring practices..." 347 U.S. at 42.

With Fowler's case in *Radio Officers* contrast Fisher's case here. The union did not suspend Fisher from membership, nor did it take any other punitive action against him. No claim was made that he had violated the union's withdrawal card rule. As we emphasized in the Petition that rule is merely permissive; it expresses no commands. It is therefore meaningless to speak of enforcing the rule against a member, or of punishing him for violating it. When the Board addresses itself to this point it completely misapprehends the meaning of the withdrawal card rule, stating that the rule "in no way benefits a member in desiring a permanent transfer." (Opp., p. 9.) There is nothing in the record to suggest, and there is no finding that Fisher did not desire a permanent transfer at the time he applied for the withdrawal card. On the contrary, it is entirely clear from the record—and indeed from the Board's Opposition itself—that Fisher did benefit from the withdrawal card provision. Fisher requested and obtained the withdrawal card in order to